STATE OF MICHIGAN

COURT OF APPEALS

PEARL LEWIS, Individually and As Personal Representative of the Estate of Mason Lewis, Deceased, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 23, 2005
v	No. 252712 Wayne Circuit Court
ST. JOHN HOSPITAL, Defendant-Appellant/Cross-Appellee.	LC No. 01-123121-NI

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right, and plaintiff cross-appeals, from a judgment for plaintiff entered after a jury trial. The jury found that defendant did not commit a battery against plaintiff's decedent, Mason Lewis (Lewis), but that defendant did act negligently in its dealings with Lewis.[1] Based on the jury's conclusions regarding the amount of damages, the trial court entered an order awarding plaintiff a total amount of $1,288,487.87. We reverse and remand for a new trial.

Lewis, who had a history of seizures, reported to defendant's emergency department about 3:55 a.m. on April 21, 2001, seeking treatment for seizures. The attending physician, Dr. Dylan Caldwell, ordered that an anti-seizure medication, Dilantin, be administered intravenously to Lewis. Witnesses testified that, at some point after defendant's staff gave Lewis discharge instructions about 6:40 a.m., Lewis began pacing and saying things such as, "[t]hey're trying to poison me," or "[t]hey're trying to kill me." Noelle Marie Maude, one of defendant's nurses, asked that defendant's security department be called to deal with the situation. Vikki Gallagher, a nurse technician, testified that she called the security department and that she felt uncomfortable as a result of Lewis's behavior.

[1] The jury also found that Lewis had been comparatively negligent and thereby caused twenty-percent of plaintiff's damages.

Berry Samuel, a security guard, arrived on the scene to render assistance. He testified that he was summoned "[f]or the purpose[] [of] escorting Mr. Lewis out of the building." Samuel testified that Dr. Marson Ma told him, "this patient has been treated and he's been discharged and we'd like him to go." According to Samuel, he approached Lewis, who stated, "[t]hey're trying to kill me here, they poisoned me and I'm not going." Lewis refused to leave his gurney, and Samuel called for backup assistance from the security department. Samuel testified that after another security guard arrived, he (Samuel) touched Lewis's arm, and Lewis backed away from him. Lewis's gurney ended up colliding with another patient's gurney. Samuel indicated that he and the other security guard "engaged in a wrestling match to get [Lewis] under control so he couldn't harm [anyone]."

Samuel additionally testified as follows: Eventually, more security guards arrived, and the guards were able to get Lewis onto a gurney. Lewis "landed on his back" on the gurney. Samuel then asked Dr. Ma if he wanted Lewis to be restrained, and Dr. Ma stated, "[y]es." Lewis continued struggling while on the gurney, and when the guards finally were able to get some straps around Lewis to restrain him, he was lying on his stomach.

Soon after being restrained, Lewis ceased breathing and died. Dr. Leigh Hlavaty, a medical examiner, testified that Lewis died from cardiomyopathy, or enlargement of the heart, and that the manner of death was "natural." Dr. Hlavaty stated:

> I believe that the physical altercation or the struggle, coupled with the eventual position of his body, meaning an obese man being placed face down on a stretcher with his head turned to the side and restrained . . . this likely precipitated his fatal heart attack.[2]

Dr. Hlavaty opined that Lewis did not die from asphyxiation. Dr. Steven Factor agreed with this conclusion, testifying that Lewis died as a result of a preexisting heart condition. Plaintiff's medical witnesses, however, testified that Lewis died from asphyxiation as a result of his being improperly restrained and essentially beaten by the security guards.[3]

Plaintiff filed a four-count complaint, alleging assault and battery, false arrest or false imprisonment, negligence or gross negligence, and intentional infliction of emotional distress. Negligence and battery were the only claims eventually submitted to the jury, and the jury found for plaintiff solely on the allegation of negligence.

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[2] Dr. Hlavaty indicated in a report that evidence of "cocaine abuse [was] present" and that the abuse "may have contributed to death." The court precluded the introduction of the evidence of cocaine abuse by way of a pretrial ruling, stating that evidence of cocaine abuse would unfairly make "the Deceased out to be a bad actor." The court subsequently reaffirmed its ruling in further proceedings discussed later in this opinion.

[3] The autopsy revealed that Lewis had broken ribs. Plaintiff theorized that these broken ribs were caused by the excessive force used by the security guards, whereas defendant theorized that they were caused by proper resuscitation efforts.

On appeal, defendant first argues that plaintiff's claim was, in actuality, a claim for medical malpractice and that the trial court should have granted its motion for summary disposition, for a directed verdict, or for a judgment notwithstanding the verdict (JNOV) because plaintiff did not, among other things, file the affidavit of merit that is required for medical malpractice actions. See *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 71 (2000). The trial court's decision with regard to each of the forgoing motions is reviewed de novo. *Graves v Warner Bros*, 253 Mich App 486, 491-492; 656 NW2d 195 (2002).

As noted in *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 422; 684 NW2d 864 (2004):

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, claims of medical malpractice necessarily raise questions involving medical judgment. Claims of ordinary negligence, by contrast, raise issues that are within the common knowledge and experience of the [fact-finder]. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [Internal citations and quotations omitted.]

The trial court concluded that plaintiff's lawsuit was *not* based on medical malpractice, stating, in part:

> It's just not a medical malpractice case. The allegations don't refer to any treatment or failure to treat or wrong diagnosis, untimely diagnosis, nothing. It just basically talks about what the security guards did that allegedly caused the decedent's death.

Defendant argues that plaintiff lawsuit was indeed based on medical malpractice because (1) Lewis, while in defendant's emergency department, exhibited signs of illness indicating that he needed medical care; (2) defendant was obligated to provide that care; (3) the restraints used by the security guards were used only because Lewis needed medical care; and (4) the restraints were used and medication was given to Lewis[4] as the result of a physician's judgment.

We disagree that plaintiff's complaint sounded in medical malpractice. As noted by plaintiff in her appellate brief:

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[4] The testimony at trial indicated that Lewis was administered anti-psychotic medication during the struggle with the guards.

> The claim has always been that security guards beat and then suffocated Lewis by pinning [him] down face-down on a gurney and holding him there with great force. No medical personnel directed the guards to subdue Lewis in the manner they subdued him.

While it is true that testimony established that Dr. Ma ordered that Lewis be restrained, there was no indication that Dr. Ma ordered *the particular facedown restraining procedure that was employed by the security guards*. The security guards, and not medical professionals, allegedly caused the problems and asphyxiation that occurred during the restraining procedure. Moreover, plaintiff did not have a "professional relationship" with the security guards. See *id.* Instead, the professional relationship was between Lewis and the medical professionals. Further, the particular manner in which plaintiff was restrained, which was the gravaman of plaintiff's complaint, did not "raise[] questions of medical judgment beyond the realm of common knowledge and experience." See *id.* Indeed, a plaintiff making a claim that a department store security guard improperly restrained him after an alleged shoplifting incident would not be raising a "question[] of medical judgment beyond the realm of common knowledge and experience." A similar situation exists in the present case. The trial court did not err in determining that plaintiff's complaint did not sound in medical malpractice.[5]

Defendant argues that even if this case did not sound in medical malpractice, defendant should nevertheless have been allowed to present evidence that the restraint of Lewis was medically necessary. We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *In re MU*, 264 Mich App 260, 276 690 NW2d 495 (2004).

The trial court ruled that witnesses could not "say [Lewis] was a patient and therefore, he needed to be medically cared for and therefore, we restrained him." However, the court indicated that defendants could elicit the fact that Dr. Ma ordered the restraint of Lewis. Under the circumstances, we find no abuse of discretion. As noted above, this case did not sound in medical malpractice, and whether ordering the restraint of Lewis was a medically appropriate decision was not at issue. It is true that it was important for the jurors to know that the security guards, in restraining Lewis, allegedly were acting under a doctor's orders, and defendant properly was allowed to introduce evidence that Dr. Ma ordered the restraint. Indeed, defendant's attorney stated the following during closing arguments:

> . . . Lewis flung himself back into a patient care area. And at that point, [Samuel] said, Doctor, do you want him restrained? Yes, I want him restrained. And thereafter he, he was acting under the authority of a doctor. And then, so that with respect to the battery claim, there is no testimony of a battery.

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[5] Because plaintiff's complaint did not sound in medical malpractice, we reject defendant's argument that the cap on noneconomic damages applicable to medical-malpractice cases applies.

However, whether the doctor's order was medically appropriate simply was not a pertinent issue in the case, and the court therefore did not abuse its discretion in disallowing evidence of medical appropriateness. See MRE 401. Moreover, under MRE 403, a court may disallow even relevant evidence if its probative value "is substantially outweighed by the danger of . . . confusion of the issues." It is highly possible that the jurors, if presented with evidence of medical reasonableness, might have become confused concerning which issues were pertinent. Reversal is not required based on this issue.

Defendant additionally argues that it was "wrongfully precluded from rebutting plaintiff's pervasive insinuations of medical negligence." Defendant lists several instances in which plaintiff allegedly interjected the issue of medical malpractice into the trial. Defendant states that "[w]hen defendant attempted to rebut these accusations and demonstrate that the hospital staff was not medically negligent in its care of plaintiff, the court refused to allow such proof." However, defendant fails to cite the parts of the lower court record in which it attempted to rebut the cited instances of alleged misconduct by plaintiff. See MCR 7.212(C)(7) (facts stated in an appellant's brief "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court"). Moreover, our review of the cited instances of alleged misconduct reveals no contemporaneous objections by defendant to which the court would have been obligated to respond.[6] Under these circumstances, defendant's briefing of the issue is deficient, and the issue is deemed waived. See, generally, *Palo Grp Foster Care, Inc v Michigan Dep't of Social Services,* 228 Mich App 140, 152; 577 NW2d 200 (1998). An appellant may not leave it up to this Court to elaborate his arguments for him, *id.,* and reversal therefore is not warranted.

Defendant next argues that the trial court erred in the middle of the trial by sua sponte ordering a bifurcation of the liability and damages phases of the trial. We review this issue for an abuse of discretion. See, generally, *Hodgins v Times Herald Co,* 169 Mich App 245, 261; 425 NW2d 522 (1988).

Before trial, the court ruled from the bench that evidence of Lewis's prior use of cocaine would not be admitted at trial, stating that evidence of cocaine abuse would unfairly make "the

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[6] Defendant does cite, in its appellate brief, instances in which it argued that it should be allowed to allege that the restraining of Lewis was medically necessary. Arguably, these cited arguments served as a type of non-contemporaneous "objection" to allowing *plaintiff* to introduce arguments or evidence regarding the medical necessity of the restraint without also allowing defendant to do so. However, this "objection" applies to only one of the cited instances of misconduct on the part of plaintiff, specifically, the instance in which plaintiff's attorney stated during opening arguments that Lewis was restrained by defendant's agents instead of receiving medical aid by defendant's agents. (The other cited instances of misconduct on the part of plaintiff related to medical issues other than the decision to restrain Lewis, e.g., the failure to inform Lewis that Dilantin may cause dizziness.) We conclude that this brief reference by plaintiff's attorney did not deprive defendant of a fair trial. See, generally, *Veltman v Detroit Edison Co,* 261 Mich App 685, 688; 683 NW 2d 707 (2004) (discussing attorney misconduct).

[d]eceased out to be a bad actor."[7] The court also ruled that evidence of Lewis's previous psychiatric problems and episodes of acting in an unstable fashion would not be admissible to show that Lewis acted similarly during the circumstances pertinent to this case. The court, however, indicated that evidence of Lewis's having had a "rocky relationship" with his wife, Pearl Lewis (Pearl), might become relevant regarding loss of consortium damages if Pearl were to testify that her relationship with Lewis had been idyllic.

Plaintiff proceeded to present all its witnesses, with the last witness being Pearl. After Pearl's direct-examination testimony, the court stated:

> Mr. Lewis's family members . . . all . . . testified that Mr. Lewis was a fine man, a responsible man, a caring man, a loving man . . . . [T]hey painted a picture of him as blemish free.
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> * * *
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> This is not an easy decision for me, but I'm going to allow cross-examination with respect to [Pearl's] knowledge of any cocaine use, any impact, if she did know, it may have had on their relationship or her feelings about Mr. Lewis.

Plaintiff's attorney then argued that he was worried that the court's pretrial ruling regarding so-called "other bad acts" was going to be violated during the cross-examination of Pearl.

The court replied:

> I think the issue of liability and the issue of damages should be submitted to the jury separately. And the only way that that can be effectively done is to take up any testimony of [Pearl] regarding hospitalization, psychiatric care [sic].
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> Cocaine is after the jury determines liability because otherwise, my prior ruling regarding cocaine on the issue of liability means nothing. The jury can and probably would use it both with respect to liability and damages.

Immediately thereafter, defendant's attorney requested a mistrial, stating that the court was limiting his ability to cross-examine Pearl "on critical issues that go to her credibility." The court rejected the request for a mistrial and in fact assigned blame to defendant for causing the late decision to bifurcate the trial, stating:

> The only reason I believe that this Court is now faced with this issue is that the defendant brought it up at the last minute.

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[7] However, the Court later retreated somewhat from its ruling, stating that it would revisit the issue later during the trial and that, if a doctor testified that recent cocaine ingestion "was a causative factor in [Lewis's] death" and the testimony had "some basis in recognized scientific knowledge," the testimony would be admissible.

> Defendant knew that there was going to be testimony regarding damages and could have asked the Court to consider or reconsider the issue of testimony evidence [sic] regarding cocaine before the end of [Pearl's] damage testimony or her direct examination I should say. So that's why we're at this juncture.

MCR 2.505(B) states, "For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, *the court may order a separate trial of one or more* claims, cross-claims, counterclaims, third-party claims, or *issues*" (emphasis added). As stated in *Hodgins, supra* at 261, the ordering of separate trials is appropriate only "upon a most persuasive showing." "This power [to order separate trials] should be exercised only upon the most persuasive showing that the convenience of all the parties and the court require such drastic action or that prejudice to a party can not otherwise be avoided." *Detloff v The Taubman Co, Inc*, 112 Mich App 308, 310-311; 315 NW2d 582 (1982).

Here, there was no persuasive showing that the action taken by the court was warranted at the point of the trial during which it occurred. Indeed, at the time of the court's order, *plaintiff had already been allowed to introduce testimony regarding damages*. As noted by the court itself, plaintiff's witnesses "painted a picture of [Lewis] as blemish free," and defendant was not allowed to counter this picture during the liability portion of the trial. This was highly prejudicial to defendant. The court attempted to blame defendant for being dilatory and causing the supposed need to bifurcate the issues during the middle of the trial, but defendant *did* raise the issue earlier and could not reasonably have anticipated that the court would order a bifurcation very near the close of all defendant's proofs. The trial court clearly abused its discretion in its handling of this issue, and we must order a remand for a new trial.[8]

Defendant next argues that the trial court erroneously ruled that Lewis's history of psychiatric problems and involuntary hospitalizations was inadmissible for purposes of liability. The trial court ruled that this evidence was inadmissible because it consisted of "other bad acts" under MRE 404(b) and tended to portray Lewis as a bad person. The court evidently was concerned that defendant would make the argument that because Lewis acted a certain way in the past, he must have acted in a similar fashion while in defendant's emergency department on the day in question.

MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

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[8] We decline to express our opinion regarding whether a bifurcated trial will be appropriate on remand. Indeed, because the parties did not fully develop the issue of bifurcation below (given the court's sua sponte action), we believe the proper course of action is to allow the parties fully to brief and argue this issue in the trial court before the commencement of trial. We caution the court to remember that the ordering of separate trials is appropriate only "upon a most persuasive showing" of necessity. *Detloff, supra* at 310-311.

> however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Here, defendant sought to introduce evidence that defendant had manifested the symptoms of a mental illness in the past. For example, defendant sought to introduce a document indicating that Pearl had previously sought hospitalization for Lewis because he was "talk[ing] crazy" and because he could "be reasonably expected within the near future to intentionally or unintentionally seriously physically injure self or others."

We conclude that the trial court abused its discretion in disallowing evidence of Lewis's psychiatric history. Indeed, even assuming that manifestations of a mental illness are "other . . . acts" within the meaning of MRE 404(b)(1), the rule makes clear that such other acts are admissible for purposes other than "to prove the character of a person in order to show action in conformity therewith." Significantly, other acts may be admissible to prove a person's state of mind. See *People v Gilbert*, 101 Mich App 459, 473; 300 NW2d 604 (1980), and *People v Cramer*, 97 Mich App 148, 157; 293 NW2d 744 (1980). The evidence of Lewis's psychiatric history was pertinent to the issue of his state of mind at the time of the incident in question. The evidence would tend to prove that Lewis was not of sound mind at the time of the incident. Evidence that Lewis was not of sound mind was highly relevant to help defendant in its attempt to prove that the particular fashion in which the security guards restrained Lewis was necessary. On remand, the court shall allow evidence of Lewis's psychiatric history to be introduced for purposes of liability.[9]

Defendant next argues that the trial court erred in excluding evidence, during the "liability phase" of trial, that Lewis had chronically used cocaine in the past and that this cocaine use contributed to his death.

Before trial, the court ruled from the bench that evidence of Lewis's use of cocaine could not be admitted at trial, stating that evidence of cocaine use would unfairly make "the [d]eceased out to be a bad actor." However, the Court then retreated somewhat from its ruling, indicating that it would revisit the issue later during the trial and that, if a doctor testified that recent cocaine ingestion "was a causative factor in [Lewis's] death" and the testimony had "some basis in recognized scientific knowledge," the testimony would be admissible. Later, Dr. Factor testified, outside the presence of the jury, that Lewis's chronic cocaine use caused cardiomyopathy, or an enlargement of Lewis's heart, which in turn caused the fatal heart episode that resulted in his death. Dr. Factor stated, "But for the cocaine use and its affect on the heart causing myocardial – acute myocardial damage and sudden arrhythmia, [Lewis] would not have died." He stated that he knew "[w]ith a high degree of medical certainty" that cocaine use

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[9] We decline to decide whether *all* the psychiatric evidence offered below by defendant should be admitted at the retrial. The trial court must exercise its discretion in determining which of the evidence to admit.

ultimately caused Lewis's death because there was no evidence of an alternative explanation for Lewis's enlarged heart. Dr. Factor admitted that his degree of certainty was strengthened between the time of his deposition and the time of trial based on certain medical articles that he read.

Plaintiff's medical experts admitted that Lewis had an enlarged heart but stated that it was caused by high blood pressure, or hypertension, and that the condition should not actually be termed "cardiomyopathy" but rather "a hypertensive heart condition with an enlargement of the heart."[10]

The court disallowed the evidence of Lewis's chronic cocaine use, indicating that Dr. Factor could testify about the poor condition of Lewis's heart but could not testify that the condition was caused by cocaine use. The court stated, among other things, "I don't think it is necessary, critical, crucial that cocaine be discussed as the cause of his heart condition or problem, and I think it would be more prejudicial than probative . . . ."

We conclude that the trial court abused its discretion in making this ruling. Indeed, in disallowing the evidence of cocaine use, the trial court seriously impacted the credibility of Dr. Factor, one of defendant's crucial medical witnesses. Dr. Factor testified that Lewis had an enlarged heart and that this condition led to Lewis's death, but the doctor was precluded from testifying about the underlying cause of the enlarged heart. Essentially, Dr. Factor was allowed to give only a partial "snapshot" of Lewis's medical issues. If the jury had heard a full account of the basis for Dr. Factor's opinion, they may have been more inclined to believe that Lewis did indeed die of a preexisting heart condition. The probative value of the cocaine evidence simply was not outweighed by the danger of unfair prejudice, especially considering that the court could have given a limiting instruction with regard to the evidence. On remand, the court shall allow Dr. Factor or another expert witness to testify regarding Lewis's history of cocaine use.

Defendant makes the additional argument that the evidence of cocaine use was relevant for purposes of comparative negligence. We disagree. It is true that in *Shinholster v Annapolis Hosp*, 471 Mich 540, 552; 685 NW2d 275 (2004), the Court held that

> if a defendant presents evidence that would allow a reasonable person to conclude that a plaintiff's negligence constituted a proximate cause of her injury and subsequent damage, the trier of fact must be allowed to consider such evidence in apportioning fault.

Here, however, plaintiff's theory of the case was that Lewis died from asphyxiation. Therefore, if the jury had concluded (or if it concludes on retrial) that Lewis died of his heart condition, comparative negligence would not be at issue (because the verdict would be for defendant). Defendant's comparative negligence argument is without merit.

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[10] The witnesses indicated that "cardiomyopathy" refers to an enlargement of the heart caused by something other than hypertension.

Defendant additionally argues that the evidence of cocaine use was relevant to the issue of Lewis's life expectancy. Defendant's briefing of this issue, however, is inadequate. Indeed, defendant merely states that "[t]he trial court sustained objection to defense cross examine [sic] plaintiff's expert regarding the impact on Mr. Lewis's life expectancy of cocaine and alcohol abuse." Defendant makes no further argument and provides no further citations or case law with respect to the issue. We conclude that defendant has waived this issue because of inadequate briefing. *Palo Grp Foster Care, supra* at 152.

Defendant next argues that the trial court "erred in limiting defense proofs and argument that its staff exercised reasonable and justified force in response to Mr. Lewis's aggressive behavior because these had not been specifically pled as affirmative defenses." Defendant contends that it should have been allowed to argue the legal concepts of "self-defense, provocation, or mutual affray." The trial court ruled that defendant could not do so because defendant did not plead these concepts as affirmative defenses or even as "general defenses."

We discern no basis for relief with respect to this issue. Indeed, before trial, defendant's attorney stated:

> My understanding is that an altercation is a mutual fight. And that is not what occurred here. That will not, that has not been Defendant's position in this lawsuit from the time it was originally filed. The position of this Defendant is, has been and always will be, that this person who is initially, who Security was initially called upon in order to escort out, when the physician, in the exercise of his judgment, determined that this person needed further medical treatment, ordered him to be restrained, which is a medical procedure [sic].
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> . . . if this was in fact an altercation or if this was a fight, the police officers, or the security officers . . . at St. John Hospital would not have held, would not have attempted to retrain [sic] him in four-point leather restraints. They would have handcuffed him and thrown him out the door.

The attorney also stated that self-defense was not at issue because defendant was not admitting that it did an otherwise wrongful act that was justified by the principles of self-defense.

Essentially, in making the above statements, defense counsel admitted that the concepts of self-defense, provocation, and mutual affray were not at issue in the trial. By making this admission and then arguing for reversal based on the trial court's ruling, defendant has attempted to "harbor [alleged] error . . . as an appellate parachute." *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). No relief is warranted.

Defendant next argues that the court erred in refusing to take judicial notice of and instruct the jury regarding certain legal principles. As noted in *Hill v Hoig*, 258 Mich App 538; 672 NW2d 531 (2003), "the trial court's determination that a jury instruction is accurate and applicable to the case is reviewed for an abuse of discretion."

First, defendant contends that the court should have instructed the jury that defendant "had the right to use force to reject a visitor who, although entering [its] premises with consent, has been asked to leave and refuses to do so." Defendant's contention is without merit. Indeed, the damages in this case were caused by the alleged improper restraint of Lewis, not by the

ejection of Lewis from the premises. The legal principle espoused by defendant was not pertinent to the central issues of the trial.

Second, defendant contends that the court erred in failing to take judicial notice of and instruct the jury regarding a statute that makes it a misdemeanor to refuse to leave premises after being asked to do so by the owner or occupant of the premises. Once again, defendant's contention is without merit. Lewis's possible criminal liability was not an issue at trial.

Finally, defendant argues that the trial court erred in failing to take judicial notice of and instruct the jury regarding MCL 330.1427, which provides, in part:

> If a peace officer observes an individual conducting himself or herself in a manner that causes the peace officer to reasonably believe that the individual is a person requiring treatment as defined in section 401, the peace officer may take the individual into protective custody and transport the individual to a preadmission screening unit designated by a community mental health services program for examination under section 429 or for mental health intervention services.

Defendant apparently contends that Samuel was acting under the authority of this statute when he restrained Lewis. Yet again, defendant's argument is without merit. There is no record evidence that Samuel was acting under the authority of this statute. Instead, Samuel testified that he was acting under the direction of Dr. Ma. Defendant is not entitled to appellate relief.

Defendant next argues that the trial court erred in instructing the jurors, in accordance with SJI2d 10.08, as follows:

> Because . . . Lewis has died and cannot testify, you may infer that he exercised ordinary care for his safety and for the safety of others at and before the time of the occurrence; however, you should weigh all the evidence in determining whether the decedent exercised due care.

Defendant argues that SJI2d 10.08 provides an incorrect statement of Michigan law, given that comparative negligence principles now apply in this state. See, e.g., *Shinholster, supra* at 552. However, in *Cole v Eckstein,* 202 Mich App 111, 114-116; 507 NW2d 792 (1993), the Court stated:

> The historical background of [SJI2d 10.08] is that in the early days of the contributory negligence era, a plaintiff was required to demonstrate not only that the defendant's negligence was the proximate cause of the plaintiff's injury, but also that the plaintiff had acted with due care. Because of the due-care requirement, if a plaintiff was deceased, it was difficult, and often impossible, to demonstrate that the plaintiff's conduct had met the due-care standard. Given the problem of meeting this element of the plaintiff's proofs, dismissal of the plaintiff's claims in this circumstance would have been required. To avoid this inequity, SJI2d 10.08, instructing the jury to infer that the deceased plaintiff had exercised due care, was adopted. As the law of contributory negligence developed, plaintiffs no longer had the peculiar burden of affirmatively proving their own nonculpability, yet the instruction continued to be used and its

> applicability was expanded to include both parties rather than just the plaintiff. The rationale was that our courts desired to level the playing field where one party, because of death, did not and could not testify. Support for this view also may be found in the use notes following SJI2d 10.08. Also added as a refinement was the limitation that the party who would utilize the instruction had to have died as a result of the incident giving rise to the suit. In light of the modern reasons for the use of the instruction, the adoption of comparative negligence in Michigan did not seem to necessitate altering the scope of SJI2d 10.08. Our Supreme Court seemed to see it that way because it recently declined to take the opportunity to discourage the use of the instruction in these circumstances when deciding *Johnson v White*, [430 Mich 47; 420 NW2d 87 (1988)]. [Internal citations omitted.]

Defendant cites no persuasive authority for the proposition that SJI2d 10.08 no longer represents an accurate assessment of Michigan law. Given the analysis set forth in *Cole, supra* at 114-116, we conclude that the trial court did not err in giving the instruction.

Finally, defendant argues that the trial court erred in awarding case evaluation sanctions to plaintiff because the case evaluation award was based, in part, on the claim for intentional infliction of emotional distress – a claim that was voluntarily dismissed by plaintiff. We decline to address this issue because we do not know if plaintiff will once again prevail after the retrial is completed. Essentially, the issue is not currently ripe for review.[11]

On cross-appeal, plaintiff argues that the trial court should have granted a default to plaintiff as a result of defendant's violation of various discovery orders. We review this issue for an abuse of discretion. *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 422-423; 668 NW2d 199 (2003).

As a result of discovery violations, a court may enter "an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or *rendering a judgment by default against the disobedient party*" MCR 2.313(B)(2)(c) (emphasis added). Here, the trial court determined that defendant had violated certain discovery orders but declined to grant a default to plaintiff as a result. Instead, the court fined defendant in the amount of $3,000. The court also precluded defendant from calling certain witnesses. We conclude that the trial court's sanctions were sufficient to address defendant's misconduct. We are not at liberty to exercise the discretion afforded *to the trial court* by concluding that a default was the more appropriate sanction, especially because, as noted in *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 654; 649 NW2d 23 (2002) "defaults and default judgments are not favored in the law." Our court system has a "preference for disposition of issues on their merits." *Id*. Plaintiff's argument is patently without merit.

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[11] We acknowledge that we have addressed several other issues in this opinion despite our order of reversal. Many of the additional issues we address, however, are virtually certain to recur on remand.

Plaintiff next argues that the trial court should have granted a JNOV with regard to the claim of battery. We decline to address this issue because we simply do not know what the jury's verdict will be after retrial. The issue is not ripe for our review.

Finally, plaintiff argues that she should be granted a new trial with respect to damages, or, in the alternative, additur. Given that we have ordered a new trial, we need not address this issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter